No. 1373

MAY 10 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois

ELLIOT BREDHOFF
MICHAEL GOTTESMAN
1001 Connecticut Avenue, N.W.
Washington, D. C.

GEORGE LONGSHORE
Cooper, Mitch & Crawford
1025 Bank for Savings Building
Birmingham, Alabama

Attorneys for Petitioners

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdictional Statement	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	8
Conclusion	15
Appendix A: Original Opinion of Supreme Court of Tennessee	17
Appendix B: Opinion of Supreme Court of Tennessee on Petition to Rehear	24

TABLE OF CITATIONS

Cases

Bloom *v.* People of the State of Illinois, October Term, 1966, No. 1070, certiorari granted April 17, 1967 (35 U. S. Law Week 3366)	13-14
Cheff *v.* Schnackenberg, 384 U. S. 373 (1966)	12-13, 14
Harris *v.* United States, No. 1279, cert. granted April 17, 1967 (35 U. S. Law Week 3366)	11
James *v.* Louisiana, 382 U. S. 36 (1965)	10
Ker *v.* California, 374 U. S. 23 (1963)	11
Mapp *v.* Ohio, 367 U. S. 643 (1961)	11
One 1958 Plymouth Sedan *v.* Pennsylvania, 380 U. S. 693 (1965)	11
Preston *v.* United States, 376 U. S. 364 (1964)	8-11
Stoner *v.* California, 376 U. S. 483 (1964)	10
Willard *v.* State, 174 Tenn. 645, 130 S.W.(2d) 99 (1939)	14

Constitution of the United States

Fourth Amendment	2, 3
Sixth Amendment	3
Fourteenth Amendment	2, 3

Tennessee Code Annotated

Title 23	
Section 902	3
Section 903	3, 7
Title 39	
Section 601	3, 12
Section 603	4, 12
Section 613	4, 12

IN THE

Supreme Court of the United States

October Term, 1966

No. ———

WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
Petitioners,

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, which is unreported at this time, was entered on November 14, 1966. The opinion is reproduced as Appendix A and attached hereto. The opinion on Petition to Rehear was entered on February 10, 1967, and is attached hereto as Appendix B. This opinion is also unreported at this time.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Tennessee was entered on November 14, 1966. A timely petition for rehearing was filed, and was denied on February 10, 1967. The jurisdiction of this Court is founded upon 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Was the following described search and seizure conducted in contravention of petitioners' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States:

> Petitioners were apprehended on an open highway and arrested for reckless driving. They, and their car, were taken to the county jail. While petitioners were detained inside the jail on the reckless driving charge, police officers, without a warrant, went outside, searched the car, and found and seized a gun located beneath the front seat.

2. Does the introduction of materials obtained by an unconstitutional search and seizure into evidence in a State court trial for criminal contempt contravene the Fourteenth Amendment to the Constitution of the United States?

3. Is a defendant in a State court trial for criminal contempt entitled under the Fourteenth Amendment to the Constitution of the United States to a trial by jury, where the conduct alleged as contempt (firing a rifle into an occupied house) is not petty or trivial but is a felony under the law of the State?

4. Where the State Constitution requires a jury trial in every criminal case in which imprisonment may result, may the State, consistent with the Fourteenth Amendment to the Constitution of the United States, deny a jury trial to a defendant charged with criminal contempt and, upon finding him guilty, imprison him?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States:

Amendment IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreason-

able searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *."

Amendment XIV. "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 23, Tennessee Code Annotated

Section 902. Scope of power—The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

> (3) "* * * The wilful disobedience or resistance of any . . . party . . . or any other person, to any lawful writ, process, order, rule, decree, or command of said courts.

Section 903. Punishment—The punishment for contempt may be by fine, or imprisonment, or both; but where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days . . ."

Title 39, Tennessee Code Annotated:

Section 601. "Assault with deadly weapon—Penalty.—If a person assaults and beats another with a cowhide, stick, or whip, having at the time in his possession a pistol or other deadly weapon, with intent to intimidate the person as-

saulted, and prevent him from defending himself, he shall, on conviction, be imprisoned in the penitentiary not less than two (2) years nor more than ten (10) years."

Section 603. "Assault with intent to commit felony—Attempt to commit felony—Penalty.—If any person assault another, with intent to commit, or otherwise attempt to commit; any felony or crime punishable by imprisonment in the penitentiary, where the punshment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500)."

Section 613. "Shooting or throwing missile calculated to produce death or bodily harm—Penalty.—Any person who wantonly or maliciously either shoots, or throws any missile calculated to produce death or great bodily harm, at or into any dwelling or any other house which is being used or occupied . . . shall be declared guilty of a felony, and, upon conviction, shall undergo confinement in the penitentiary for a period not less than one (1) year nor more than five years."

STATEMENT OF THE CASE

The employees of Taylor Implement Manufacturing Company, Inc., in Athens, McMinn County, Tennessee, chose the United Steelworkers of America, AFL-CIO, as their collective bargaining representative. The Union was certified by the National Labor Relations Board on September 20, 1965 (R. 2).*

Negotiations for a contract were unavailing and a legal strike began on January 12, 1966 (R. 2). Petitioners were employees who participated in the strike.

---

* As used in this petition, "R" refers to Volume I of the Record prepared by the Clerk of the Supreme Court of Tennessee, and "R (Vol. II)" refers to Volume II.

The Company sought and obtained a state court injunction, from the Chancellor of the McMinn County Equity Court, which enjoined the Union and its striking members:

> "(c) From inflicting harm or damage upon the person or property of Complainant's employees, customers, visitors, or any other persons. This includes but is not limited to the throwing of tacks or other sharp objects on the roadway or driveway;"

On February 25, 1966, a shot was fired from a 1960 Dodge automobile into the home of a nonstriking employee who lived in a neighboring county, Monroe County, about 25 miles from the struck plant (R. 95-96). McMinn County police received a report on their car radio that the shooting had occurred, and that the automobile involved was an "old make model car" (R. 139).

Shortly thereafter, McMinn County police observed "kinda an old model car", with its right tail-light out, speeding down a highway (R. 139-40). They stopped the car, observed a bullet-hole in the trunk, and arrested the occupants (petitioners) for reckless driving (R. 139-42). Petitioners were taken to the county jail (R. 142); and the car—owned by petitioner McKinney—was towed to and parked outside the county jail (R. 120, 136). While petitioners were detained inside the jail on the reckless driving charge, police officers, without obtaining a warrant, went outside and searched the car. Their search uncovered an air rifle and ammunition (R. 134-35).

Petitioners were never criminally indicted for the shooting in Monroe County. However, on March 14, 1966, the Company filed a "Petition for Attachment for Contempt" in the McMinn County Equity Court, alleging that petitioners had fired the shot, and that their doing so violated the injunction against "inflicting harm or damage upon the per-

sons or property of Complainant's employees." More specifically, the petition alleged:

> "On or about February 25, 1966, at approximately 11 p.m. while Lloyd Duckett, a nonstriking employee of the complainant, was at his home located in Monroe County, Tennessee, along with four members of his family, an automobile drove to his premises from which a shot was fired into his home. Thereupon the fleeing car in question was pursued, identified, and caught. It was found that the three occupants of the car were John Blackwell and the defendants Wayne Dyke and Ed McKinney, all three of whom are striking employees of the complainant and members of the defendant Union. The said Wayne Dyke is the elected president of the local group of the defendant Union. A rifle of the type which fires a projectile of the sort found at the Duckett home was discovered in the car at the time of the apprehension and arrest of the said three striking employees." (R. 19.)

Defendants pleaded not guilty, and demanded a jury trial (R. 74). The Chancellor refused to provide them a jury trial (R. 99). They were tried by the Chancellor on March 22, 1966.

The only evidence linking defendants to the shooting in the adjoining county was the evidence obtained by searching the car. Deputy Sheriff Powers testified that defendants were arrested for reckless driving (R. 142); that they were brought to the county jail (R. 134-35); and that while there detained their automobile was searched and the evidence uncovered:

"A. We set them on the bench there in jail. Set them on the bench. Told them to set there on the bench and went on back out at that time and searched the car. On the right-hand side of the front seat I taken a gun from under the front seat; stuck back under the front seat.

"MR. TAYLOR: We object to that.

"THE COURT: I overrule.

"MR. TAYLOR: Note our exception.

"Q. (By Mr. Carter) Go ahead.

"A. And——

"THE COURT: (interposing) You might be in good shape in a Criminal Court, but this is not Criminal Court, Mr. Taylor.

"Q. (By Mr. Carter) Go ahead, Mr. Powers.

"A. I also found some ammunition in the seat where Ed McKinney was sitting for this gun" (R. 142-143).

The defendants were convicted and given the maximum punishment authorized, 10 days in jail and a $50.00 fine, Tennessee Code Annotated, Title 23, Section 903.

Defendants appealed to the Supreme Court of Tennessee, on the grounds, *inter alia,* that the denial of jury trial and the admission of the materials obtained from the search of the car violated their rights under the Constitution of the United States (Appendix pp. 18-19).

On November 14, 1966, the Supreme Court of Tennessee denied the appeal. On the jury trial issue, the Court merely recited that the federal Constitution does not require a jury trial (App. pp. 20-21). On the search and seizure issue, the Court found the search lawful:

> "Appellants' assignment of error 3 argues that the trial court erred in admitting evidence relating to an air rifle found in appellant McKinney's automobile. It is true that such weapon was found by search of the automobile, without search warrant. The evidence contained in this record shows, however, that the search of the car was made after the appellant McKinney had been arrested for reckless driving. No question is made but that this was a lawful arrest. The question then is

whether the search was reasonable or otherwise. The gun was found, according to the only evidence contained in the record, under the front seat of the automobile. It is the law of this State that, within reasonable limits, the police may search pursuant to a lawful arrest the person and property of the person arrested for evidence of the crime for which he is arrested, and for weapons which might be utilized for resistance or escape. It is the opinion of this Court that the search here conducted was within those reasonable limits. If so, evidence of other unlawful conduct produced pursuant to a lawful search of this type is admissible in prosecution based upon such other unlawful conduct. (App. pp. 21-22).

Defendants petitioned for rehearing, again asserting that on both issues their federal Constitutional rights had been denied. The petition for rehearing was denied on February 10, 1967 (App. p. 24).

Defendants' federal claims were asserted at all stages of the state proceedings. See, e.g. R. 74, R. 84, R. 142-143, R. (Vol. II) pp. 10-12, 75-76, 82-93.

REASONS FOR GRANTING THE WRIT

I.

In holding the search and seizure without a warrant constitutionally permissible, the decision below directly conflicts with decisions of this Court.

A. In *Preston* v. *United States,* 376 U. S. 364 (1964) the defendants, while sitting in their parked automobile, were arrested by police officers for vagrancy. The defendants were taken to police headquarters, and their car was taken to the police garage. While defendants were under detention, the police conducted a search of the car without a warrant. This Court held the search to be unconstitutional:

"The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the 'fruits' or 'implements' of the crime of vagrancy. Cf. *United States* v. *Jeffers*, 342 U. S. 48, 51-52, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See *Carroll* v. *United States, supra*, 267 U. S. at 153, 45 S.Ct. at 285, 69 L.Ed. 543. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible" (376 U. S. at 368).

The Court dismissed the government's reliance on the "rule allowing contemporaneous searches":

"The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident

to the arrest. *Agnello* v. *United States, supra,* 269 U. S., at 31, 46 S.Ct. at 5, 70 L.Ed. 145" (376 U. S. at 367).

Here, as in *Preston,* the search was "remote in time or place from the arrest." The arrest was made on an open highway; the search was conducted outside the county jail, substantially later. Moreover, neither of the reasons assigned by the court below could justify the search. There was no need to search "for weapons which might be utilized for resistance or escape" (App. p. 22), for the defendants were already under detention in the county jail and did not have access to the automobile. Likewise the search could not be justified as "for evidence of the crime for which [defendants were] arrested" (App. p. 22), for they were arrested for reckless driving and there are no articles "which could be the 'fruits' or 'implements' of the crime" of reckless driving. Cf. *Preston* v. *U. S., supra,* 376 U. S. at 368.

Nor could the search have been justified on the ground that the police had "probable cause" to believe that defendants were involved in the shooting in the next county. No one, including the court below, has suggested that there was such "probable cause." But even if there were, it would not have validated the search. *Preston, supra,* 376 U. S. at 367-68:

> "Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. *But this does not decide the question of the reasonableness of a search at a later time and at another place.* See *Stoner* v. *California,* post, p. 483" (Emphasis supplied).

In upholding the search conducted here, the decision below also conflicts with this Court's decisions in *Stoner* v. *California,* 376 U. S. 483 (1964), and *James* v. *Louisiana,* 382 U. S. 36 (1965). These cases apply the principle of

Preston to State Court trials. See also, *Mapp* v. *Ohio,* 367 U. S. 643 (1961); *Ker v. California,* 374 U. S. 23 (1963).

This Court has recently granted certiorari in another automobile search case alleged to be in conflict with *Preston, Harris* v. *United States,* No. 1279, cert. granted April 17, 1967 (35 U. S. Law Week 3366). We believe that the facts of the instant case are closer to *Preston,* and therefore even more deserving of review by this Court, than those in *Harris.*

B. The Chancellor justified the admission of the evidence obtained from the search of the automobile on the ground that the exclusionary rule of *Mapp* is not applicable to a criminal contempt proceeding. As he put it "You may be in good shape in a Criminal Court, but this is not Criminal Court" (R. 143).

This rationale was not relied upon in the opinion of the Tennessee Supreme Court. In any event, it is clear that the exclusionary rule of *Mapp* applies to a trial for criminal contempt. In *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693 (1965), this Court applied the exclusionary rule to a State Court proceeding for forfeiture of a car. This Court characterized the forfeiture as "quasi-criminal in character. Its object, like a criminal proceeding, is to penalize the commission of an offense against the law" 380 U. S. at 700. *A fortiori* the rule must be applicable to a State Court proceeding which may result in the forfeiture of the defendants' liberty, particularly when, as here, the conduct for which defendants were being tried in criminal contempt also constituted a violation of the criminal laws of Tennessee, and the trial judge described the proceeding as "quasi-criminal" (R. 173).

II.

In holding that defendants were not entitled to a jury trial, the decision below raises Constitutional issues which have not been, but should be, decided by this Court.

1. The first question presented by this holding is whether, under the guise of a contempt trial for violating an injunction, persons may be imprisoned without a jury trial for conduct which constitutes a felony under the State criminal law.

It has long been axiomatic that "equity will not enjoin a crime." The axiom survives, except in labor disputes. In certain states, it has become popular for employers to seek, and obtain, injunctions against the commission of violent acts by striking employees. If violence then occurs, the employer assumes the role of prosecutor, institutes "criminal contempt" proceedings, and seeks to imprison the strikers.

This case dramatizes vividly the extent to which this procedure places the whip in the employer's hand. The shooting which is the basis for this contempt proceeding occurred 25 miles from the employer's plant, in another county, and was directed not against the employer's property, but against the property of an employee. The authorities in that county did not see fit to institute criminal proceedings against defendants. Nonetheless, the injunction forbade violence by strikers against other employees, and the Chancellor construed it as broad enough to reach the conduct here.

The conduct with which defendants were charged—firing a rifle into an occupied house—constitutes a felony under the criminal laws of Tennessee. See, e.g., Tennessee Code Annotated, Title 39, Sections 601, 603, 613. Had defendants been tried for violation of those statutes, they would have been entitled to a jury trial. May their right to jury trial be denied by trying and imprisoning them, instead, for contempt of the injunction?

In *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), a majority of the Justices[1] held that, in federal courts, sentences

[1] The Chief Justice, Mr. Justice Clark, Mr. Justice Brennan, and Mr. Justice Fortas so held in the opinion of Mr. Justice Clark. Mr. Justice Douglas and Mr. Justice Black, in dissent, would hold jury trials required in all criminal contempt proceedings, a holding which would seem, *a fortiori*, to provide a majority for the rule (albeit not the reasoning) stated in Mr. Justice Clark's opinion.

exceeding six months would not be permitted in criminal contempt proceedings "absent a jury trial or waiver thereof." Jury trials would not be required in lesser criminal contempt proceedings, because they are "equivalent to a procedure to prosecute a petty offense, which under our decisions does not require a jury trial." 384 U. S. at 379.

Manifestly, where, as here, the conduct which is alleged to constitute criminal contempt is also a felony under the State criminal law, the trial cannot be characterized as "equivalent to a procedure to prosecute a petty offense," even though the maximum authorized imprisonment for contempt is less than six months. The unique character of contempt trials involving criminal conduct is recognized in 18 U.S.C. § 3691, which expressly provides a right to jury trial in federal cases where the contemptuous conduct charged constitutes "a criminal offense under any Act of Congress, or under the laws of any State in which it was done or omitted."

This case thus squarely poses the question whether the limited right to jury trial recognized in *Cheff* is (a) applicable to State trials under the Fourteenth Amendment, and (b) applicable to trials where the maximum penalty is less than six months' imprisonment but the conduct constitutes a felony under State law.

This Court has already agreed to decide these matters in *Bloom* v. *People of the State of Illinois,* October Term, 1966, No. 1070, certiorari granted April 17, 1967 (35 U. S. Law Week 3366). In *Bloom,* an attorney was found guilty of criminal contempt, after his request for a jury trial had been denied, for forging a will. Forgery is a felony under the criminal law of Illinois. The first "Question Presented", as set forth in the petition for certiorari in *Bloom* (page 2), is:

> "1. Is a defendant in a State Court trial for criminal contempt entitled under the Fourteenth Amendment to

the Constitution of the United States to a trial by jury particularly where the conduct alleged as contempt is not petty or trivial but is a felony under the law of the State."

This question arose in a rather unusual context in *Bloom*. In the instant case, it arises in the more usual setting: a criminal contempt proceeding, under an injunction issued in a labor dispute, involving conduct also proscribed by the State criminal law. Stated otherwise, the issue here is whether an employer may prosecute and imprison its striking employees, without a jury trial, for engaging in conduct which constitutes a felony and which, if prosecuted under the criminal code, would require a jury trial.

B. The second "jury trial" question presented by the decision below is whether, in a state which provides jury trials in *all* criminal cases where the defendant is subject to imprisonment, including "petty offenses", a defendant in a criminal contempt proceeding may be imprisoned for less than six months without a jury trial.

In Tennessee, the State Constitution has been construed to require a jury trial in all criminal cases, including misdemeanors, in which imprisonment, no matter how short, is an authorized sentence. *Willard* v. *State,* 174 Tenn. 645, 130 S.W.(2d) 99 (1939). This result is required, according to the Supreme Court of Tennessee, because that was the practice at the time the Tennessee Constitution was adopted.

Cheff equated right to jury trial in criminal contempt cases with the treatment of true criminal cases of comparable severity. If that holding is applied to the States through the Fourteenth Amendment, it would follow that Tennessee cannot imprison for criminal contempt without a jury trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD KLEIMAN
10 South LaSalle Street
Chicago, Illinois

ELLIOT BREDHOFF
MICHAEL GOTTESMAN
1001 Connecticut Avenue, N.W.
Washington, D. C.

GEORGE LONGSHORE
Cooper, Mitch & Crawford
1025 Bank for Savings Building
Birmingham, Alabama

Attorneys for Petitioners